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HARD LAWS MAKE BAD CASES—LOTS OF THEM (THE CALIFORNIA GUEST STATUTE)

Edward L. Lascher*

I. RECENT DEVELOPMENTS

Twice in the space of a recent ten-month period the California Supreme Court departed from a temporary state of insouciance toward litigation by automobile guests against their negligent drivers.¹

In the first case, *O'Donnell v. Mullaney*,² the court established a rule which had never been enunciated in California. In reversing both lower courts, the court held unanimously that when the guest statute says it applies only on the highway, it applies only on the highway and not, therefore, on private property. It also attempted to remind the bench and the lower courts of the rhythmically-repeated propositions that inquiry should start from the premise that a wrong produces a remedy; that the Guest Act is an exception thereto and thus to be narrowly and strictly construed, where possible favoring recovery over windfall exculpation; and that the courts lack both power and motive to invent new forms of exemption from liability for negligence.³ Although strict construction of "highway" had not been previously enunciated by the California court, it had been followed in practice by a large segment of the bar with acquiescence by most automobile insurance carriers in this state.⁴

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¹ It is not to be gainsaid, of course, that the supreme court's inattention to this field in the then-recent past may have been involuntary (or at least not readily avoidable) in view of the more dramatic and attention-riveting characteristics of the criminal law explosion, reapportionment, open housing and the like.

² 66 Cal. 2d 994, 429 P.2d 160, 59 Cal. Rptr. 840 (1967); see for intermediate appellate level, 55 Cal. Rptr. 827 (1967), *vacated*.

³ The court may have hoped that the workings of history and evolution had brought it to the point where a famous plaint of Andre Gide, echoed by Justice Vallee, was no longer accurate: "Everything has been said already; but as no one listens, we must always begin again." With rhythmic regularity it is necessary for us to [reiterate certain fundamental propositions]. No one seems to listen." *Overton v. Vita Food Corp.*, 94 Cal. App. 2d 367, 370, 210 P.2d 757, 759 (1949), *disapproved on other grounds in* *Parsons v. Bristol Dev. Co.*, 62 Cal. 2d 861, 402 P.2d 839 (1965).

⁴ The fact that such had been the prevailing practice did not discourage a number of insurance counsel from lodging an *amicus curiae* protest with the court against their being required to continue doing that which they had always done. Guest

In *Williams v. Carr*,⁵ the second of the pair, the court at least listened to its own injunction and invoked the strict construction approach to resolve the question of whether a guest's ordinary contributory negligence constituted a bar to wilful misconduct of a host. In rejecting the apples v. oranges contention, the court held that only conduct of an equally culpable character ("contributory wilful misconduct") could be considered in bar.

Both of these decisions were of first impression in California and both were of conspicuously consequential effect on the auto-accident-litigation "industry," although the result in *Williams* was markedly more unanticipated than *O'Donnell*, though no less logically compelled. Somewhat significantly, in both the court elected the path of allowing compensation to the plaintiff (i.e., negligently injured guest rider).⁶ At least equally significant, in both the court did so after the superior court and the court of appeal had in turn spurned the cause of the injured plaintiff—and in no uncertain terms, at that.⁷

statutes, by nature, seem to evoke strange enthusiasms and animosities among otherwise phlegmatic lawyers and judges.

⁵ 68 A.C. 603, 440 P.2d 505, 68 Cal. Rptr. 305 (1968); see for intermediate appellate level, 62 Cal. Rptr. 681 (1967), *vacated*.

⁶ Even more so than in most areas of legal writing, nomenclature is all-important in the field under consideration. However, not everyone agrees on the nomenclature. Therefore, a glossary of terms as used in this article may be apt.

"Guest Statute" (sometimes doing business as "Guest Act"): A statute whereby the common law right of the victim of a negligent tort to recover for his injuries against the tortfeasor is curtailed or altered, based solely on the fact that the tortfeasor was at the wheel of a motor vehicle in which the victim was riding. Usually does not apply to a "passenger" *infra*, and usually does not apply if the tortfeasor is intoxicated or found guilty of wilful misconduct (or in some jurisdictions, "gross negligence," "wanton misconduct," "heedless misconduct," or whatever the local variety of supertort may be, to say nothing of the mind-boggling "intentional accident"). In California, see CAL. VEH. CODE § 17158 (West Supp. 1967).

"Driver": The operator of a motor vehicle which in some way runs afoul of the guest statute.

"Host": A driver who has a rider who, in turn, is a guest.

"Guest": A rider in the host's car who does not give consideration for the ride (frequently termed a "mere guest," "gratuitous guest," "ungrateful guest," or other epithet).

"Passenger": A rider who, because of giving "consideration," *infra*, is not a guest and therefore entitled to recover for negligently inflicted injuries.

"Consideration": That which distinguishes a guest from a passenger. Beyond this, a term which has defied rational analysis or definition for almost 40 years.

While these definitions are based primarily on accepted courtroom usage, the courts have also sanctioned some of them as acceptable shorthand. *E.g.*, *Kruzic v. Sanders*, 23 Cal. 2d 237, 241, 143 P.2d 704, 705 (1943).

⁷ As discussed hereafter (§ VI. B.), it is a characteristic of this field that the supreme court leads the way and thereafter the judiciary follows fitfully and reluctantly, if at all, leaving the court of last resort to come back and do some dragging from time to time.

II. THESIS: THE GUEST STATUTE MERITS A LONG, HARD, PENETRATING LOOK

It may well be that these two decisions, intrinsically, will have a significant impact for good or ill on host-guest litigation in California courts. (They both seem so eminently sensible and self-explanatory that great scholarly outpouring does not seem indicated. Such indications are not always accurate, however.) Analysis of these particular flowers of the garden of host-guest law is not the objective of this article. Someone else can count the petals and do a qualitative analysis of the pollen; it is the writer's opinion that there has been far more than enough of that already.

The function of this writing is an examination of the whole weed-choked, foul-smelling patch which is known as the Guest Act, rather than rumination on any of its component parts. The question is not whether *O'Donnell* and *Williams* are new and beautiful grandiflorae, noxious weeds or effective insecticides. The question before the house is whether or not the time has come to bulldoze-under the whole garden of the Guest Act and use it to mulch a new era of law and reason—extending even to those who ride in automobiles on California's scenic highways.

Since it is not the writer's purpose to string out suspense or overburden the taxed reading hours (or minutes) of the legal scholar or practicing lawyer, he will defy convention and supply the answer right now: The Guest Act should go, preferably by enlightened legislative action recognizing its infirmities, but even if that is denied to the citizenry then it should go by forthright judicial declaration of unconstitutionality. For the mystery fan, that is what has come to be known as the crunch. All that remains of this article is an exploration of the question: Why?

III. CONSTITUTIONALITY IS AN OPEN QUESTION

Doubtless the first reaction of the guest statute apologists would be one of pointing out the widely held assumption that constitutionality is long and authoritatively settled. Unarguably that assumption is widespread, but upon examination it does not seem conspicuously well founded.

A. *Under the Federal Constitution*

The validity of auto guest legislation under the Federal Constitution is premised exclusively on a 1929 decision of the Supreme

Court, *Silver v. Silver*.⁸ In *Silver*, the Supreme Court, speaking unanimously through Mr. Justice Stone, dealt with an attack on the Connecticut Guest Act, which had been upheld by a split decision of that state's highest court.⁹ Noting that the record was insufficient to allow true analysis of the constitutionality of the statute (and therefore confining attention only to the opinion below), the Supreme Court viewed with alarm the "increasing frequency of litigation in which passengers carried gratuitously in automobiles, often casual guests or licensees, have sought the recovery of large sums for injuries alleged to have been due to negligent operation."¹⁰

It held that the question of curbing the "serious increase in the evils of vexatious litigation in this class of cases . . . is for legislative determination" and that discrimination between paying and nonpaying riders could not necessarily be held unreasonable.¹¹ Building upon the assumed premise (which might be challenged) that the legislature could take the lesser step of differentiating between injured parties, it said:

In this day of almost universal highway transportation by motor car, we cannot say that abuses originating in the multiplicity of suits growing out of the gratuitous carriage of passengers in automobiles do not present so conspicuous an example of what the Legislature may regard as an evil, as to justify legislation aimed at it, even though some abuses may not be hit. [Citations.] It is enough that the present statute strikes at the evil where it is felt and reaches the class of cases where it most frequently occurs.¹²

There is something almost quaint in both the language and the reasoning. Certainly this case is not among the more enduring monuments of a great American jurist. Starting with the assumption that something is an evil and then reasoning to the conclusion that because it is an evil it therefore, of course, may be remedied by the legislature is not a generally productive method of adjudication, constitutional or otherwise; building a straw man of epithet and thereupon tailoring a remedy to combat him was rarely a characteristic of Mr. Justice Stone's contribution to the body of the law. The opinion is so offhand, so full of *non sequitur* and *ipse dixit* as to be more an embarrassment than a keystone upon which to build—particularly into this day (40 years later) of far more universal highway transportation and, more to the point, universal highway slaughter.

⁸ 280 U.S. 117 (1929).

⁹ *Silver v. Silver*, 108 Conn. 371, 143 A. 240 (1928).

¹⁰ 280 U.S. at 122-23.

¹¹ *Id.* at 123.

¹² *Id.* at 123-24.

That *Silver* was something of an embarrassment to the court itself seems clearly apparent. It is a decision which has been afforded an atypical place in history for a Supreme Court pronouncement: That of being studiously avoided. In the past quarter-century, for example, it has been cited by the Supreme Court a grand total of three times: Once for the proposition that the states may regulate highway usage;¹³ once (in a footnote) with the observation that the case "in no wise bear[s] on the issue now before us";¹⁴ and once in a per curiam memorandum of dismissal for want of a federal question, the reason for citing *Silver* being obscure.¹⁵

It has been of at least equal disinterest to the lower federal judiciary, going virtually uncited at the court of appeals and district court levels. In the states, however, it remains the great lodestone of constitutionality of guest statutes. It is submitted that the case is not much of a foundation, and that it would be worthwhile to examine the question of constitutionality—and to do so upon a full and adequate record, viewing the statute under the conditions of the mid-20th century, rather than those which were contemporaneous with Henry Ford's Model T.

B. *In California*

California courts, while conspicuously willing to render grave and scholarly consideration to disputations of supreme quiddity in the application and interpretation of the statute,¹⁶ have shown an astonishingly casual and hands-off attitude toward pivotal, fundamental issues inherent in such cases.¹⁷

In view of this tendency, there is at least some consistency in the fact that the constitutionality of the California statute has been far more assumed than it has been adjudicated. Both courts and litigants seem to have given it a wide berth. The first challenge to its constitutionality—and in large measure the only one—came in *Forsman v. Colton*,¹⁸ a 1933 appeal to the Third District (Sacramento). In *Forsman* the court stated, as dictum, that the basic

¹³ *Railway Express Agency v. New York*, 336 U.S. 106, 116 (1949).

¹⁴ *Niemotko v. Maryland*, 340 U.S. 268, 286 n.2 (1951).

¹⁵ *Clarke v. Storchak*, 322 U.S. 713 (1944).

¹⁶ Such as the burning social question of whether rendering advice on selection among brands of olives is a valuable consideration. See *Lundell v. Hackbarth*, 226 Cal. App. 2d 609, 38 Cal. Rptr. 137 (1964).

¹⁷ Witness the fact that it took almost 40 years to decide whether contributory negligence is a defense or if the statute applies on private property, which seems somewhat more central to the application of the law than do the other inconsequential and petty issues which have been so diligently resolved.

¹⁸ 136 Cal. App. 97, 28 P.2d 429 (1933).

statute was constitutional and held that a 1931 amendment to the statute did not adversely affect the plaintiff's standing before the court.¹⁹ The plaintiff did not bother to seek a hearing by the California Supreme Court.

For three decades, that obiter was taken as gospel until in 1963 in *Patton v. La Bree*,²⁰ the supreme court first heard words unleashed in anger in the direction of constitutionality. Even this tardy attack was not directed to the statute itself, but rather to a 1961 amendment which made an owner a guest in his own car no matter what the nature of his occupancy. That appendage to the statutory concept was found constitutional by everyone except Justice Peters and even he seems to have conceded, inexplicably, the as-yet-uncontested question of the validity of the whole underlying scheme; nobody on the court discussed the latter.

A year later, with that whimsical disregard for normal chronology which seems to characterize this field of law, the Third District in *Ferreira v. Barham*²¹ got another whack at its 30-year old decision in *Forsman*. Conceding that *Forsman* had been erected on a defective foundation, the court held that it had been right anyway, on the ground that the supreme court had hinted in *Patton* that the statute might be constitutional and that Justice Peters had condemned only the amendment as unconstitutional, the latter being cited as a clincher as to constitutionality.

Finally, the last "challenge" to constitutionality occurred when one of the divisions of the Second District Court of Appeal did a death-defying dance on the head of a pin by citing *Ferreira* as revealed demonstration of constitutionality.²²

That is the alpha and omega of the "assault" on the constitutionality of the guest statute before the California appellate courts, and the latter's "adjudication" of that validity. A cynic might well suggest of the guest statute that with enmity like that, it scarcely needs friendship. Certainly it is safe to state that the constitutionality of this bit of legislation has not exactly been tempered into a fine steel blade by the searing fires of an adversary method or careful judicial analysis of the contending arguments and weighing of sound principles. Therefore, it seems in order to brush aside that evanescent web of constitutional adjudication and to take a fresh look at whether or not that old friend the guest statute happens

¹⁹ *Id.* at 102, 28 P.2d at 431.

²⁰ 60 Cal. 2d 606, 387 P.2d 398 (1963).

²¹ 230 Cal. App. 2d 128, 40 Cal. Rptr. 739 (1964).

²² *Stephan v. Proctor*, 235 Cal. App. 2d 228, 45 Cal. Rptr. 124 (1965).

to be compatible with a couple of even older friends, the State and Federal Constitutions.

IV. APPLYING THE CONSTITUTIONAL TESTS

A. *Restraints on the Legislative Function*

It has been several centuries since an English jurist could assert with a straight face that "An act of Parliament can do no wrong"—even adding, ironically, "though it may do several things that look pretty odd."²³ But it remains true that the legislature is the body best suited to the eradication of pernicious statutes and the ballot box is the best stimulus to achieving that end.

There is a presumption of validity which surrounds a statute. Indeed, a whole bromidic liturgy (which became trite in part because it was true) springs readily to mind, and to the judicial tongue and pen, whenever a litigant has the bad manners to challenge a statute, and particularly one that has been around for a while.²⁴ Even as against constitutional attack, broad legislative discretion is zealously recognized, and judicial review starts from the presumption that the lawmakers were in fact discreet.

However, ours is a constitutional government, and not one of parliamentary paramountcy. Therefore, the presumption of validity and discretion is only a rebuttable one,²⁵ and, as is true of other rebuttable presumptions, once it is dispelled, there's nothing left of it.²⁶

The two pertinent constitutions invalidate a statute, even though the legislature has regularly adopted it—and even though it has been around a while—if, among other things, it denies equal protection of the laws to any person, grants a special privilege or immunity to any citizen or class of citizens which is not granted

²³ *City of London v. Wood*, 12 Mod. 669, 687-88, 88 Eng. Rep. 1592, 1601 (1701).

²⁴ See, e.g., *Patton v. LaBree*, 60 Cal. 2d 606, 387 P.2d 398 (1963); *Ferreira v. Barham*, 230 Cal. App. 2d 128, 40 Cal. Rptr. 739 (1964).

²⁵ Even the California Legislature has recently supplied an illustration of that fact. In 1935, the legislature amended the California Code of Civil Procedure to provide that a party litigant could not substitute his own attorney out of the case, if the attorney was on a contingent fee, unless he first obtained a drumhead adjudication by the court as to the amount of the fee to which the attorney was entitled. CAL. CODE CIV. PROC. § 284(2) (West 1954). Not too surprisingly, this was held unconstitutional in *Echlin v. Superior Court*, 13 Cal. 2d 368, 90 P.2d 63 (1939). After a mere 28 years during which this unconstitutional provision remained on the books to confuse and occasionally trip an unwary lawyer or judge, the legislature decided to go along with the Constitution and deleted the amendment. CAL. CODE CIV. PROC. § 284(2) (West Supp. 1967). However fine they grind, the mills of the legislature at least grind abundantly slow.

²⁶ CAL. EVID. CODE § 604 (West 1966).

to all citizens, or, as a general law, fails to have a uniform operation.²⁷ Even here, however, it must be conceded that these constitutional mandates do not prohibit legislative classification, nor require every statute to affect every person in the same way. But, once again, there is a Newtonian reaction. The mere fact that the legislature says that the statute classifies (rather than discriminates) does not end the inquiry, which depends on the substance more than the label,²⁸ nor does the mere fact that everyone within a specific class happens to be treated the same way settle the matter.

If a classification is "palpably unreasonable" or without "reasonable relation to a proper legislative objective", the presumption is overcome, the legislature has departed from the province of its discretion, and the statute is invalid.²⁹

Judicial inquiry under the Equal Protection Clause does not end with a showing of equal application among the members of the class defined by the legislation. The courts must reach and determine the question whether the classifications drawn in a statute are reasonable in light of its purpose³⁰

In a nutshell, the equal protection clause requires rationality.³¹

In determining whether or not rationality is present, the courts give the legislature the benefit of the doubt—but not unqualified benefit. For example, the legislature may confer special privileges, but: "Once the reason for conferring a special privilege ends, the privilege must end."³² Similarly, the burden of a statute may fall upon a particular class, but only if there is a reasonable distinction between that group and the groups excluded from the class, and the

²⁷ U.S. CONST. amend. XIV, § 1; CAL. CONST. art. 1 §§ 11, 21. For ease of reference, all three of these constitutional provisions will be lumped under the shorthand title of "equal protection." Even the constitutional purists who might be anguished at such indiscriminate lumping together are hard put to identify the realistic difference among the three, particularly when applied to the testing of a statute such as the guest statute. Even the courts seem to treat them as largely interchangeable.

²⁸ *Looff v. City of Long Beach*, 153 Cal. App. 2d 174, 181-82, 314 P.2d 518, 524 (1957). The author of the *Looff* opinion, Justice Fourt, is perhaps California's most outspoken critic of judicial willingness to invalidate acts of the legislature. He is also, however, one of the most outspoken spokesmen for the proposition (perhaps not as self-evident as it should be) that rationality plays a role in the legal method. There may be a lesson in the confluence of these two factors with the result that the normal reluctance to intervene ran second to a reaction to irrationality.

²⁹ *Blumenthal v. Board of Medical Examiners*, 57 Cal. 2d 228, 233, 368 P.2d 101, 103 (1962); *County of Los Angeles v. Southern California Tel. Co.*, 32 Cal. 2d 378, 392, 196 P.2d 773, 782 (1948).

³⁰ *McLaughlin v. Florida*, 379 U.S. 184, 191 (1964).

³¹ *Rinaldi v. Yeager*, 384 U.S. 305, 308-09 (1966).

³² *In re Norwalk Call*, 62 Cal. 2d 185, 192, 397 P.2d 426, 431 (1964) (dissenting opinion); cf. CAL. CIV. CODE § 3510 (West 1954): "When the reason of a rule ceases, so should the rule itself."

distinction has some relationship to the purpose for which the statute is designed.³³

Of course, one great saving clause for otherwise unredeemable statutes is the oft-stated proposition that the legislature need not attempt to stamp out every evil with a single statute; the legislature need only tend reasonably to hit an existing evil (or a part thereof) at which it aims.³⁴ The problem under this head is the lack of any specification as to just what was the target of the legislature's aim. Until the target is ascertained, it is conspicuously difficult to determine whether the marksman is shooting at it or away from it. This article will shortly consider the possible targets so that it may be ascertained whether or not the statutory classifications are approaching the bull's-eye.³⁵

That target evaluation (Section V, *infra*), however, must also be considered against the backdrop of a wise, if seldom heeded, admonition of the Supreme Court to the effect that equal protection requires particularly close scrutiny of a legislative discrimination where it is "of an unusual character;" the presence of such unusual characteristics in legislation "suggest[s] careful consideration to determine whether they are obnoxious to the constitutional provision."³⁶

If there is one conclusion which it is safe to draw concerning the guest statute (and there may well be more than one), it is that such legislation is unusual in the acme.³⁷

B. *Guest Statutes Fail the Test of Reason and Rationality*

Weighed by these standards of logic and rationality, automobile-guest legislation has been found wanting—in many ways, places

³³ Department of Mental Hygiene v. McGilvery, 50 Cal. 2d 742, 754, 329 P.2d 689, 695 (1958).

³⁴ E.g., McLaughlin v. Florida, 379 U.S. 184, 191 (1964); Queenside Realty Co. v. Saxl, 328 U.S. 80, 84 (1946); O'Donnell v. Mullaney, 66 Cal. 2d 994, 999, 429 P.2d 160, 163 (1967).

³⁵ Ex-infantry riflemen with long memories may, one suspects, think more in terms of "Maggie's drawers."

³⁶ Morey v. Doud, 354 U.S. 457, 464 (1957); Louisville Gas & Elec. Co. v. Coleman, 277 U.S. 32, 37-38 (1928).

³⁷ It is unarguable, of course, that there are a lot of other bizarre statutes on the books. A glance through such "Alice in Wonderland" subject matters as asparagus labeling, the adoption of an official nickname (the contradiction in terms to end all contradictions), and other such outpourings of the last session of the California Legislature would soon give the comeuppance to any claim that the Guest Act is alone on its pinnacle of unreason. However, most such pixilated statutes are of highly specialized application and transitory duration. In the heavyweight division, the guest statute has won the accolade of absurdity as unchallenged champion for more than a generation.

and disciplines. It is unreason personified and even in an older, more conservative era, a not particularly sociologically-oriented judge still said: "Nothing is law which is not reason."³⁸

Such legislation, which is "the result of persistent and effective lobbying on the part of liability insurance companies"³⁹ who were "represented by well-organized, well financed and effective lobbyists, while the unorganized and unknown injured persons of the future had no lobbies or agents at all",⁴⁰ is not peculiar to California. Some 27 states have adopted this curious form of statute.⁴¹ Connecticut enjoys the dubious distinction of leading the pack in several ways: It was the first to adopt a guest statute and it was that state's statute which evoked the first, last and only putative "adjudication" of constitutionality.⁴² It was also the first to repeal the statute, legislatively.

This legally complex and far-reaching enactment aimed at hitchhikers was drafted by non-lawyers; due to an unprecedented fluke it was not even referred to or studied by the legislative judiciary committee, composed of lawyers, most of whom would probably have opposed the measure. After ten years Connecticut repealed the statute, in spite of the governor's veto, but not before many other states had passed similar laws.⁴³

Such statutes were, however, peculiar to a particular moment in time (at least as the law measures things). All were enacted between 1927 and 1939 and are, therefore, the product of an era which dawned while the twenties were still roaring and the stock market still soaring, and while "depression" referred primarily to a state of mind. Age, of course, is no producer of opprobrium in the general experience of the law, but where the subject is intertwined with technology, the passage of time may have significance. Any doubt that the subject matter of guest legislation has undergone some significant changes should be dispelled by comparing a 1927 LaSalle or a 1939 Hudson with a 1969 Toronado, GTO or Chaparral—or, for that matter, by comparing the old El Camino Real with the Nimitz Freeway or Los Angeles' four-level interchange.

Even the general purpose of such statutes as phrased by the leading treatise in the field has a sort of antedeluvian ring to it: "[Guest statutes] were designed to relieve the harshness

³⁸ Powell, J., *Coggs v. Bernard*, 2 Lord Raymond 909, 911 (1703).

³⁹ W. PROSSER, *TORTS* § 34, at 190-91 (3d ed. 1964) (footnote omitted).

⁴⁰ Tipton, *Florida's Automobile Guest Statute*, 11 U. FLA. L. REV. 287, 288 (1958).

⁴¹ *Id.* at 288; see AM. JUR. 2d *Desk Book* Doc. 123, at 304-05 (1962).

⁴² See § III. A., *supra* and accompanying authorities.

⁴³ Tipton, *supra* note 40, at 288 (footnotes omitted).

of the common law rule which requires the exercise of ordinary care”⁴⁴

In the seventh decade of the twentieth century, it is not generally regarded as unduly “harsh” to require a citizen to make restitution for the harms that he inflicts on others—even those inflicted by means of mere negligence.

1. *Guest Legislation is Irrational in Theory.* If there is any other field of legislation which is more unanimously and universally condemned than the guest statutes, it certainly does not spring readily to mind. As Dean Prosser points out:

The typical guest act case is that of the driver who offers his friend a lift to the office or invites him out to dinner, negligently drives him into a collision and fractures his skull—after which the driver and his insurance company take refuge in the statute, step out of the picture, and leave the guest to bear his own loss. If this is good social policy, it at least appears under a novel front.⁴⁵

The condemnation has not been peculiar to the groves of academe. The judiciary has been almost equally vocal in denouncing the role into which the legislation has forced the courts. (One cannot help wishing, however, that there had been a little more realistic scrutiny—and consequent action—to accompany the denunciations.) Perhaps the most eloquent condemnation⁴⁶ comes from the Supreme Court of Michigan,⁴⁷ in the course of a decision noting the unabated need to wrestle with the statute, its history, the scholarly criticism thereof, and the vain nature of the struggle to harmonize it with sound legal principles.

Our difficulties with the interpretation of this act arise from an irreconcilable conflict between the provisions of the act and the prin-

⁴⁴ 5 D. BLASHFIELD, *AUTOMOBILE LAW AND PRACTICE* § 211.5, at 109 (3d ed. 1966).

⁴⁵ W. PROSSER, *TORTS* § 34, at 191 (3d ed. 1964) (footnote omitted). The good Dean's antagonism to the statutes is not some personal idiosyncrasy; he is merely—and typically—quotable on the subject. Professors Harper and James term the field “a welter of words” which has “bred confusion and conflict,” acting “in derogation of the common law [and cutting] athwart a vital trend in the common law.” 2 F. HARPER AND F. JAMES, *TORTS*, 953, 958, 961 (1956).

Indeed, as to almost any jurisdiction which has (1) a guest statute and (2) a university which publishes a law review, it is a safe bet that somewhere there is a treatise apostrophising the statute—in terms of varying fervor (and even varying humor), but unvarying condemnation.

⁴⁶ It is a source of no little regret and chagrin to the writer—an unashamed chauvinist when it comes to the California judiciary—that the California reports are singularly devoid of demurrers, to say nothing of denunciations—eloquent or otherwise.

⁴⁷ *Stevens v. Stevens*, 355 Mich. 363, 94 N.W.2d 858 (1959).

ciples and traditions of the common law, the customs and convictions of our people. Thus, our law has long held that one who undertakes to act must act with a due regard for the safety of others. The fact that no money changes hands is not determinative of this duty or of liability. . . . The shining thread traceable through the tapestry of these decisions is well known to all of us, the value placed by our people upon human life and human safety. The thought requires no elaboration. Our pen can add nothing to its lustre. There it stands, crystal clear, illumined by its own intrinsic radiance.

Hand in hand with this rubric of the common law runs another: the fulfillment of trust imposed. Rightly or wrongly, our law has prided itself that those who put their faith in another shall not suffer uncompensated harm through that other's falsity or lack of care. It has been our boast that when one entrusts another with life or property relying upon a relationship of trust and confidence, rather than the weapons and guarantees of the business world, a performance of duty the most exacting will be demanded, a conformity not with the arm's length standards of the market but rather the infinitely nicer standards of the hearth and the heart. The authorities we need not cite.

The guest passenger acts changed all of this. The friends of the driver, his family, those to whom he stands in the closest relationship of faith, and trust, and confidence, must suffer injury at his hands without recompense, solaced only by the thought that, after all, the skull was cracked by a friendly hand. His legal status, this invited guest, is no better than that of a trespasser. The hospital bill, the loss from the long illness, all arising from the wrong of another and without fault on the part of the victim, must be shouldered without the aid of him who did the wrong. Why? Because the relationship between them was one of trust and friendship. No money had changed hands. If, however, not the neighbor himself is carried to town, but rather his livestock to the slaughterhouse, many modern courts will permit full recovery for injury to the unfortunate animal through failure to use reasonable care for its safety. Is this one answer of an enlightened people to the hallowed question: 'How much then is a man better than a sheep?'⁴⁸

2. *Guest Legislation Has Proved Irrational in Practice.* Scholarly theorizing is not necessarily always the best or even the last word; the proof of a statute may be in the applying. As applied, the guest statute has certainly had some substantial and conspicuous effects. From the standpoint of its specific impact on the California judicial machinery it is examined in some greater detail hereafter.⁴⁹

⁴⁸ *Id.* at —, 94 N.W.2d at 862 (footnote omitted). The courts of at least one jurisdiction dissent in part both from the New Testament (*Matt.*: 12:11, 12) and from the Michigan reliance thereon, asserting that the question of whether a man is better than a sheep is for the legislature to decide. *Mitzel v. Hauck*, — S.D. —, 105 N.W.2d 378, 382 (1960).

Such is the persuasive power of guest legislation that Holy Writ, Magna Charta, the Declaration of Independence, the Constitution and other monuments to the rights of men must play second fiddle to a statutory preference for sheep.

⁴⁹ See § VI, *infra*.

At this juncture, the question is: Even though the statute *seems* logically indefensible, has it worked out logically in practice? Answer: NO.

The first thing which strikes one about guest legislation is that the division of jurisdictions provides a controlled experiment, almost unparalleled, in which comparative analysis (or, perhaps, differential diagnosis) is so readily available. The second striking feature is that the legislation appears to have no effect except that of mischief-making.

The jurisdictions which have adopted guest statutes⁵⁰ vary from the nation's most populous state (our own California) and the fourth most populous (Texas), to the nation's second and third least populous (Wyoming and Vermont). On the other hand, 24 jurisdictions⁵¹ struggle along without statutory gratitude (or whatever the excuse is) and these include the second and third most populous states (New York and Pennsylvania) as well as the least populous (Alaska). Thus, there is an attractive symmetry. In fact, there is more symmetry than sense.

Among other things, there is no showing extant to justify the conclusion that North Dakota passengers, for example, are one scintilla more grateful for favors than are their neighbors in Minnesota, despite the fact that drivers in the Land of the Thousand Lakes expose their hands to biting, unprotected,⁵² while those in North Dakota do not. On the other hand, nobody has advanced any very convincing claim that host-guest litigation in the courts of Wisconsin—where there is no legislative safeguard against perjury, collusion, et al.⁵³ is any more pristine pure and unblemished than it is in the circuit courts of Mayor Daley's Cook County just to the south, where there is "protection" against "collusion" and the other myriad of evils which holding a tortfeasor responsible for his torts entails.

Specifically, there appears to be no correlation between existence or nonexistence of a guest statute and level of automotive liability insurance premium (nor, for that matter, with the level of underwriting profit—a perhaps less compelling consideration, but

⁵⁰ Alabama, Arkansas, California, Colorado, Delaware, Florida, Idaho, Illinois, Indiana, Iowa, Kansas, Michigan, Montana, Nebraska, Nevada, New Mexico, North Dakota, Ohio, Oregon, South Carolina, South Dakota, Texas, Utah, Vermont, Virginia, Washington, and Wyoming. See note 39 *supra*.

⁵¹ Alaska, Arizona, Connecticut, District of Columbia, Georgia, Hawaii, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Mississippi, Missouri, New Hampshire, New Jersey, New York, North Carolina, Oklahoma, Pennsylvania, Rhode Island, Tennessee, West Virginia and Wisconsin.

⁵² See § V. A. *infra*.

⁵³ See § V. B. *infra*.

one which is significant by its absence). The urban or rural character of a state, the size and density of its population (human and automotive), the existence of large route concentrations and the nature and condition of its highways are the factors which determine a state's insurance premium level. If those add up to a high premium level, the premium remains high with absolutely no reference to what the legislature does about a guest statute.⁵⁴

The pluperfect illustration of the statute in actual operation may be gleaned from a perhaps-hypothetical case.⁵⁵

Husband and Wife enter the family car in the driveway for the purpose of driving to the post office and mailing a birthday card.⁵⁶ If Husband backs negligently down the driveway and hits a lamp post before reaching the street, injuring Wife, Wife can recover against Husband. No danger of collusion there and no worry about ingratitude. If, however, he makes it to the street and backs into a car parked at the opposite curb, the guest statute applies and he and his insurance company have to be protected from Wife's ingratitude.⁵⁷

If he successfully negotiates that street, and reaches the post office, where he double parks, with Wife getting out of the car to run across the street and mail the card, he is liable for his ordinary negligence in failing to warn her if he sees that she is running into the stream of traffic, where she is hit by another car. If, however, she makes it back and he pulls out into the stream of traffic, he is not liable for ordinary negligence.

Of course, it should be remembered that all of this might be academic if Wife were going along to advise on Christmas shopping or selection of olives, in which case it would possibly be a business trip; but not if the couple were on their way to get married, which is a mere courtesy of the road.

From all of this, it appears that at least a *prima facie* showing

⁵⁴ Tipton, *supra* note 40, at 305-06.

⁵⁵ But undoubtedly one which has occurred somewhere, such being the nature of guest litigation.

⁵⁶ It must be a greeting card, and not a letter with any possible business connotation; moreover, it should not even be a greeting card directed to anyone who might possibly be of any service to the couple, or they might get into the realm of compensation or mutual benefit or such.

⁵⁷ Presumably, however, the insurance company does not need protection against Husband's deciding that there was indeed a business purpose to the trip.

is made that the statute falls somewhat below the constitutional norms of rationality, legitimate objective and reasonable means. It remains to be seen, however, whether the apologists of the statute are able to rehabilitate it effectively.

V. THE JUSTIFICATIONS GIVEN IN SUPPORT OF THE STATUTE DO NOT WITHSTAND SCRUTINY

In common with other states, the California courts have set forth (with more clarity than logical support) two rationales which are the exclusive justification for the statute—two targets at which the legislature is supposedly shooting.⁵⁸ Typically, these words were put in the mouth of the legislature; the two chambers in Sacramento have never been so bold as to assay a rationalization of that which they have wrought. Unlike the courts in most states, the California courts have even gone so far as to make clear the order of importance of these two objectives. They are, in that order of importance:

1. Protecting the negligent driver against the evil of ingratitude on the part of his victim;⁵⁹ and
2. Protecting *against* that same negligent driver, whose presumed intent is to conspire with his victim to make sure that victim does recover compensation.⁶⁰

A. *The Two Objectives Appear Directly Contradictory*

There is more than a little bit of logical difficulty in reconciling the notion that the driver needs protection against ungrateful lawsuits with the idea that he is likely to be a prime mover in bringing about those lawsuits. The unspoken truth of the matter, of course, is that the nasty phrase "insurance company" must be read into that equation somewhere or other. Even the presence of insurance, however, does not completely obviate the contradictory nature of these pious propositions.

⁵⁸ Some states have added a third justification, that of keeping the insurance policy-fund intact and available for the benefit of those riding in cars other than the host-guest vehicle (blithely but unwarrantedly assuming that all guest litigation stems out of multi-car collisions). *See, e.g.,* *Dym v. Gordon*, 16 N.Y.2d 120, 124, 209 N.E.2d 792, 794, 262 N.Y.S. 463, 466 (1965). Mercifully, the California courts have spared our corpus juris that particular solecism.

⁵⁹ *Martinez v. Southern Pac. Co.*, 45 Cal. 2d 244, 253, 288 P.2d 868, 872 (1955); *Kruzie v. Sanders*, 23 Cal. 2d 237, 242, 143 P.2d 704, 706 (1943); *Sand v. Mahnan*, 248 Cal. App. 2d 679, 683, 56 Cal. Rptr. 691, 696 (1967); *Stephan v. Proctor*, 235 Cal. App. 2d 228, 230, 45 Cal. Rptr. 124, 125 (1965); *Bowman v. Collins*, 181 Cal. App. 2d 807, 814, 5 Cal. Rptr. 776, 780 (1965).

⁶⁰ *Sand v. Mahnan*, 248 Cal. App. 2d 679, 683, 56 Cal. Rptr. 691, 696 (1967); *Stephan v. Proctor*, 235 Cal. App. 2d 228, 230, 45 Cal. Rptr. 124, 125 (1965).

If the objective is to protect the driver against the consequences of base ingratitude on the part of the guest whom he maims (even assuming that this is a legitimate concern of the sovereign), then the reason ceases to exist once that driver is insured, since he ordinarily is no longer afflicted by any ingratitude. He is not the victim of this fall from virtue; his insurance company is, and the insurance company did not extend the courtesy (and earn the gratitude) in the first place. If, on the other hand, the objective is not to protect the driver (by hypothesis a lying, conniving, collusive ne'er-do-well who merits the back of the law's hand), but rather to protect against him, then the reason for the statute would fail in any case where the host was uninsured.⁶¹

As it stands, however, the courts are in the somewhat contortionist posture of saying that the same statute is designed to protect a virtuous, protection-deserving citizen and at the same time to protect against a villainous, evil citizen, the trouble being that it is the same citizen. Old adages about blowing hot and cold on the same transaction, speaking with forked tongues and the like come readily to mind. Ingratitude, it is submitted, is not the only human failing and in the legal method it may even be a failing of less consequence than hypocrisy. Particularly so when that hypocrisy is practiced in the temples of the law.

The vice of these justifications for the statute, however, is not merely that they cancel each other out; even viewed independently, they are irrational rationales.

B. *Viewed Separately, the "Gratitude" Rationale is Unavailing*

The rationale which the California courts have said to be the most important⁶² is that of stamping out "the proverbial ingratitude of the dog that bites the hand that feeds him,"⁶³ i.e., the friend, neighbor, or family member who is ungrateful enough to want to be compensated when his driver-host maims him. In other somewhat-victorian terms, the courts apostrophize the passenger as a "mere invited guest" whose claimed right to be made whole offends every natural feeling of justice.⁶⁴

⁶¹ One may suspect that there are those among that which Dean Prosser calls the insurance lobby who would shrug their shoulders and say that was okay with them: Let the ungrateful wretch who does not pay premiums stew in his own juice. There may be a lesson here, concerning the overall morality of the Guest Act.

⁶² *Stephan v. Proctor*, 235 Cal. App. 2d 228, 230, 45 Cal. Rptr. 124, 125 (1965).

⁶³ *Crawford v. Foster*, 110 Cal. App. 81, 87, 293 P. 841, 843 (1930).

⁶⁴ *Id.*; *cf.*, *Kudrna v. Adamski*, 188 Ore. 396, 216 P.2d 262, 263 (1950); *Annot.*, 16 A.L.R.2d 1301 (1951).

As if this failure of the plaintiff to display full measure of the puritan virtue of gratitude were not enough, it is customarily assumed that he is a hitchhiker. Needless to say, the concept of a hitchhiker—often conjured up as a hippie, yippie, or the like—as a successful plaintiff is a powerful argument in favor of protecting auto owners. However, it seems that even if hitchhiking was as prevalent a transportation norm as that in the depression thirties, it has long since ceased to be such in the affluent sixties.⁶⁵ For that matter, one wonders whether the hitchhiker-plaintiff was ever more than a scapegoat or rationalization for a statute whose honest motivation was quite different.⁶⁶ No California decision involving a hitchhiker has been discovered. Nationally, Dean Prosser points out: "In legislative hearings there is frequent mention of the hitchhiker, who gets little sympathy. The writer once found a hitch-hiker case, but has mislaid it. He has been unable to find another."⁶⁷

But whoever that churlishly-ungrateful wretch who seeks to recover for "mere ordinary negligence" may be, and whatever the relationship that got him into that position to suffer from his benefactor's tort, it still seems that the primary purpose of stamping out ingratitude is a conspicuously illegitimate one. Phrased baldly, it is none of the state's business what kind of virtuous emotions the citizenry feels or fails to feel. Far be it from the writer to decry morality or claim that it has no relationship to the law. The point, however, is that a man is free to be as immoral as he desires and it is none of the legislature's business what his state of mind may be. "The object of the law is not to punish sins,"⁶⁸ but "[t]he lawmaker must have in mind . . . practical limitations and must not suppose that he can bring about an ideal moral order by law if only he can hit upon the appropriate moral principles and develop them properly by legislation."⁶⁹

The cry of sumptuary legislation may be somewhat less persuasive than it was in the early days of the New Deal, but there is still some question as to the power of any branch of government to impose legal consequences upon the subjective workings of the human mind or human heart.

⁶⁵ Tipton, *supra* note 40, at 300.

⁶⁶ Shortly after the adoption of the California Guest Statute (a point in time which involves some circumstantial probabilities of trustworthiness), California commentators were quite candidly admitting that the true motivation of the statute was to benefit liability insurance companies—even defending it on that ground—other rationalizations being termed mere windowdressing. Comment, 18 CALIF. L. REV. 184, 194 (1930).

⁶⁷ W. PROSSER, TORTS § 34, at 191 n.83 (3d ed. 1964).

⁶⁸ Holmes, J., in *Commonwealth v. Kennedy*, 170 Mass. 18, 20, 48 N.E. 770, 770 (1897).

⁶⁹ II R. POUND, JURISPRUDENCE 254 (1959).

A statute making it a penal offense, subject to punishment as a felony (or even a misdemeanor) for one person to entertain ingratitude toward another person might well encounter some noticeable constitutional objections. Is it any more permissible for the legislature to aim at stamping out ingratitude by licensing benefactors to maim the guilty parties?⁷⁰

Moreover, if it is a legitimate function of the sovereign to prevent the making of any reparations to a person whose breast harbors ingratitude, how is it that the state sanctions the enjoyment of medical pay benefits by ingrates? It is a matter of common knowledge that the vast majority of auto liability policies issued in California contain such provisions, by which the injured party is entitled to restitution for medical expenses—even if the host is not guilty of any wrong.⁷¹

If there is, indeed, a public interest so strong as to justify prohibiting restitution to a guest who has been the victim of a wrong, how can it conceivably be rational to allow him to recover when there is no wrong? For that matter, why is ingratitude tolerated when it relates to medical bills but not when it relates to wrongful death? Is a guest any less ungrateful if he seeks reimbursement from his generous host for broken glasses than when he seeks reimbursement for the lifetime effects of blindness? There are strange things wrought in the name of moral indignation over ingratitude.

Finally, the folly of the legislated-gratitude approach is illustrated by a consideration of the area of conflict of laws. For example, in a jurisdiction which applies the rigid "place of the wrong" test for choice of law, a California host-driver needs protection against ingratitude when he is on one side of the Colorado River but when he crosses to Arizona, gratitude becomes a matter of morality and not statute. On the other hand, applying the "grouping-of-contacts" test,⁷² a California host driving through Arizona might be held entitled to statutory gratitude whereas his opposite number in the next car who happens to be a Minnesota resident would not—and

⁷⁰ Query: Why not, then, banish from use of the public libraries anyone who fails to express sufficient gratitude for its many beneficent services? Or prohibit the use of the United States mail by any of the not-insubstantial number of citizens who give vocal expression to their complaints concerning the quality of service they receive? And above all, should not the doors of the superior courts be closed to any litigant (or, better still, lawyer) who has the ingratitude to appeal one of its decisions? Of course, the legislature is not required to stamp out all evil manifestations of ingratitude in a single statute. But what would be the result if the lawmakers, emboldened by a generation of success in stamping out vehicular ingratitude, decided to expand the cure to such other manifestations.

⁷¹ CAL. INS. CODE § 108(b) (West Supp. 1967).

⁷² Reich v. Purcell, 67 Cal. 2d 551, 432 P.2d 727 (1967).

both of them are in Arizona! The gratitude argument, then, only serves to complicate and obfuscate an already complicated, obfuscated and irrational patchwork.⁷³

C. *Viewed Separately, the "Collusion" Rationale is Unavailing*

Thus, it appears that the statute cannot be rehabilitated on the basis so solemnly proclaimed as primary. It is necessary, therefore, to fire and fall back to the secondary policy. That has been succinctly stated by one of the courts of appeal: "A secondary policy, of course, is to prevent collusive suits between friends where the driver admits negligence in order to shift the burden to his insurance carrier."⁷⁴

That solecism has been iterated and reiterated so often that it has come to have a veneer of superficial reason. It does not stand scrutiny too well, however.

1. *It Is a Conspicuously Selective and Ineffectual Way to Prevent Collusion.* Disregarding the apparently dim view that its proponents take of the honesty of their fellow citizens,⁷⁵ and the considerable tendency of human nature to revolt at charging oneself with wrongdoing,⁷⁶ it involves a rather tunnel-visioned view of what is effective collusion. Presumably the theory is that counsel for the injured guest will put the defendant host on the stand and propound to him the following question:

Will you please tell the court and jury whether or not you exercised the care of the reasonably prudent man under the same or similar circumstances, actuated by those considerations which normally regulate the conduct of human affairs; that is to say, did you do something which the reasonably prudent man would not do or fail to do something which the reasonably prudent person would do?⁷⁷

Assuming that such a question, or something like it, would withstand objection, the whole venture still seems a little lacking in

⁷³ See Ehrenzweig, *Guest Statutes in the Conflict of Laws—Towards a Theory of Enterprise Liability Under "Foreseeable and Insurable Laws"*: 1, 69 YALE L. J. 595, 599, 600 (1960).

⁷⁴ *Stephan v. Proctor*, 235 Cal. App. 2d 228, 230, 45 Cal. Rptr. 124, 125 (1965).

⁷⁵ And their willingness to subject themselves to felony prosecution for insurance fraud and perjury: CAL. INS. CODE § 556 (West 1955); CAL. PENAL CODE §§ 118, 118(a) (West 1955).

⁷⁶ It is unarguable that the vast majority of non-guest auto accident litigation involves insured defendants. It is also less than a bizarre phenomenon for the defendant and the plaintiff in a two-car (non-guest) accident case to be acquainted or even friendly, particularly in the smaller communities. There has been no recognizable trend in such cases, however, for defendants to engage in wholesale perjury and collusion merely because there was insurance.

⁷⁷ *Cf.*, 1 CAL. JUR. INST. CIV. 4th, No. 101 (1956).

forensic effect. One must entertain a low opinion of the common sense of a juror to assume that twelve of the litigant's peers would fail to see through this or be particularly impressed by such a "confession." Even apart from rebuttal, it seems realistic to assume that such an approach might have as much of a boomerang effect in favor of the insurance company as anything.

But even more to the point, why is it that everyone assumes that the only form of collusion known to mankind is that of "admitting negligence?" Given the hypothesis of a defendant hell-bent to commit fraud and perjury in favor of the plaintiff, it seems every bit as easy to admit wilful misconduct or intoxication. And isn't it even easier to take care of the whole problem by fabricating "consideration," whereupon everyone can forget about collusion—presumably.⁷⁸

2. *Broad, Effective Preventives Exist In Other Statutes.* Among other things, the guest statute is superfluous if it is premised on a legislative attempt to stamp out fraud against insurance companies. The legislature has already dealt with that by making such practice felonious.⁷⁹ Indeed, that statutory provision was already law (although in a different code) at the time the Guest Act was adopted.⁸⁰ Frauds which have been committed have been redressed under that statute. It has had fairly frequent application: enough to demonstrate that it is an effective means of dealing with insurance fraud, while not enough to demonstrate the wholesale prevalence of fraud in the citizenry which would justify stamping out legitimate claims as a countermeasure to endemic fraud.⁸¹

⁷⁸ Instead of the colloquy hypothesized above, there is the following: "Q. Why did you make the trip, Mr. Driver? A. Well, Joe and I negotiated for a while before we decided to go to the bar, and I tried to persuade him to go along so that he could give me the benefit of his expertise on beer selection. In fact, we decided, after some negotiation, that he would offer to go with me and select a brand if I would accept by my conduct in transporting him. I accepted his offer."

⁷⁹ "It is unlawful to:

(a) Present or cause to be presented any false or fraudulent claim for the payment of a loss under a contract of insurance.

(b) Prepare, make, or subscribe any writing, with intent to present or use the same, or to allow it to be presented or used in support of any such claim.

Every person who violates any provision of this section is punishable by imprisonment in the State prison not exceeding three years, or by fine not exceeding one thousand dollars, or by both." CAL. INS. CODE § 556 (West 1955).

⁸⁰ CAL. PENAL CODE § 549, repealed Stats. 1935, ch. 145 § 13002.

⁸¹ E.g., *Scotfield v. State Bar*, 62 Cal. 2d 624, 401 P.2d 217 (1965); *People v. Kanan*, 208 Cal. App. 2d 635, 25 Cal. Rptr. 427 (1962); *People v. Loomis*, 207 Cal. App. 2d 229, 24 Cal. Rptr. 281 (1962); *People v. Benson*, 206 Cal. App. 2d 519, 23 Cal. Rptr. 908 (1962) (something of a vintage year for insurance fraud, evidently); *People v. Reed*, 190 Cal. App. 2d 344, 11 Cal. Rptr. 780 (1961); *People v. Wirth*, 186 Cal. App. 2d 68, 8 Cal. Rptr. 823 (1960); *People v. Zelver*, 135 Cal. App. 2d 226, 287 P.2d 183 (1955); *People v. Grossman*, 28 Cal. App. 2d 193, 82 P.2d 76 (1938).

Compare *Teitelbaum Furs, Inc. v. Dominion Ins. Co.*, 58 Cal. 2d 601, 375 P.2d

In contrast to this admirable means of dealing with criminals by prosecuting them for crime (a manner of sovereign action which has a good deal to commend itself), the guest statute appears to have been a dismal failure. Despite its much more general application, the writer has failed to discover a single case involving the guest statute in which the presence of collusion has even been suggested. The guest statute approach of dealing with possible criminality by confiscating everyone's common law rights of action, then, is not only morally and theoretically indefensible; it does not seem to work.

True, a statute is not unconstitutional merely because it is ineffectual.⁸² But where the legislature has prescribed a means of dealing with a particular form of antisocial behavior, and a punishment to be imposed upon the perpetrators of that behavior, it is submitted that the realm of unconstitutionality is reached by superadding a punishment upon the entire citizenry—those subject to the felony provisions and those innocent—in an effort to make sure that presently innocent citizens do not become guilty. This smacks of both double punishment and bill of attainder—admittedly not in their literal sense, but in their underlying philosophy and rationale.

3. *The Notion That Judicial Relief Is To Be Withheld Because of Possibility of Wrongdoing Is Widely Discredited.* Moreover, the mere fact that wrongdoing may be possible in connection with certain types of litigation is not often thought to be justification for stamping out legitimate claims in that field.

Indubitably, juries and trial courts, constantly called upon to distinguish the frivolous from the substantial and the fraudulent from the meritorious, reach some erroneous results. But such fallibility, inherent in the judicial process, offers no reason for substituting for the case-by-case resolution of causes an artificial and indefensible barrier. . . . The mere assertion that fraud is possible, "a possibility that exists to some degree in all cases" . . . does not prove a present necessity to abandon the neutral principles of foreseeability, proximate cause and consequential injury that generally govern tort law. . . . [W]e cannot let the difficulties of adjudication frustrate the principle that there be a remedy for every substantial wrong.⁸³

So saying, the California Supreme Court held that the mere possibility of fraud and collusion was no justification for flatly rejecting claims for negligently inflicted emotional trauma. The same has been said of the possibility of fraud and collusion in actions between members of the same household; husband versus wife,

439 (1962), with *Teitelbaum v. Borders*, 206 Cal. App. 2d 634, 23 Cal. Rptr. 868 (1962) and *People v. Teitelbaum*, 163 Cal. App. 2d 184, 329 P.2d 157 (1958).

⁸² If it were, havoc would be wreaked in the fabric of the law.

⁸³ *Dillon v. Legg*, 68 A.C. 766, 775, 776, 777, 441 P.2d 912, 918, 919 (1968).

parent versus child.⁸⁴ The possibility of fraud or collusion, we are told in those contexts, does not justify closing the courtroom door to honest claims. (I.e., any such arbitrary withholding of judicial remedy would be unreasonable and therefore unconstitutional.) The same courts which have sounded those clarion notes, however, have added a caveat: *unless the potential conspirators are driving and riding in an automobile*. The Constitution, it seems, does not apply on the highways.⁸⁵

Furthermore, assuming the objective of stamping out the practice of collusion by destroying every possibility thereof, then it must be remembered that the objective must be approached in a manner which does not deny equal protection or impose special burdens on specific classes. It must be approached, in short, in a legitimate fashion. How, then, can the legislature single out only one narrow class—those citizens riding in automobiles on the public highways without giving consideration—as the only group which will feel the lash of the anti-collusion drive? Is there any rational basis for segregating that particular coterie of potential conspirators from the entire mass which the legislature and the courts seem to see lurking under the bed?

4. *The Concept of Protecting Insurers Against Loss Is Contradictory of the Legal Preference for Insurance*. Finally, if there is a truly legitimate objective to stamp out collusion against automobile liability insurance companies, how can that objective possibly be reconciled with the financial responsibility laws⁸⁶ which make liability insurance virtually mandatory? According to this theory, with one hand the legislature is forcing the motorist to carry (and pay for) insurance, while at the same time it is guarding against the policyholder receiving the protection for which he pays. One or the other seems unreasonable—and the author has a strong hunch which it is. The only reasonably effective way of prohibiting anti-insurance

⁸⁴ *Self v. Self*, 58 Cal. 2d 683, 376 P.2d 65 (1962); *Klein v. Klein*, 58 Cal. 2d 692, 376 P.2d 70 (1962); *Emery v. Emery*, 45 Cal. 2d 421, 289 P.2d 218 (1955).

⁸⁵ While it is true that the Federal Constitution does not guarantee equal protection to all persons within the state boundaries except guests in automobiles, and the State Constitution does not add to its prohibition against special privileges and immunities a saving clause allowing discrimination on the public highways, it is possible for the apologists to explain this as a sort of legislative oversight. After all, the automobile had not been invented at the time either constitution was adopted (or even at the time the fourteenth amendment was added). Undoubtedly the presumption is that, had the founding fathers known there would be an automobile, they would have denied equal protection to its occupants and therefore their failure to prohibit this form of discrimination must be interpreted as approbative. That, at least, is the only theory which has occurred to the author for the proposition that the Constitution does not follow the flag as far as the freeway.

⁸⁶ CAL. VEH. CODE §§ 16000-503 (West 1955).

company collusion would be either doing away with rights of action against insured motorists or prohibiting the issuance of insurance. Certainly the method adopted to avoid collusion is absolutely the worst method of achieving that goal: virtually compelling the motorist to be insured. If it is truly a legitimate objective to burn the barn down to make sure that no insurance company is the victim of collusion, then the financial responsibility and insurance laws are utterly repugnant to that objective.

All this, of course, is ridiculous. So is the rationalization of the statute.

VI. IN OPERATION, THE GUEST STATUTE HAS IMPOSED AN INTOLERABLE BURDEN ON CALIFORNIA'S JUDICIAL MACHINERY

The mere fact that the guest statute appears lacking in even the minimal rationality of purpose and effect sufficient to carry it past constitutional scrutiny should, it seems, be sufficient reason for either judicial or legislative determination⁸⁷ that indeed the Constitution is supreme, even over the guest statute. However, if that is not sufficiently persuasive, an examination of the *actual effect* of the statute in operation over a generation of experience with California litigation, ought to serve as something of a tie breaker or makeweight. All theory, principle and philosophy aside, any realistic appraisal of the statute in operation shows that it has hung more than one albatross around the neck of an already-strained adjudicative apparatus, including:

1. A gross volume of litigation which is utterly wasteful of the state's finite resources, both in terms of economic waste and squandering of judicial time and effort;
2. A demoralizing state of anarchy among the various levels of the judiciary; and
3. A degrading and corruptive picture of capricious, erratic and inconsistent legal gamesmanship.

The California experience has proved correct Dean Prosser's dyspeptic observation: "There is perhaps no other group of statutes which have filled the courts with appeals on so many knotty little problems involving petty and otherwise entirely inconsequential points of law."⁸⁸

⁸⁷ Or preferably that determination by both.

⁸⁸ W. PROSSER, *TORTS* § 34, at 191 (3d ed. 1964).

A. *The Statute Has Produced an Avalanche of Litigation*

So far as the writer has been able to ascertain,⁸⁹ the guest statute has played a pivotal role⁹⁰ in the decision of 201 appeals since its adoption.

According to the latest report of the California Judicial Council, the average number of civil dispositions per California appellate justice is approximately 43 per year.⁹¹ In other words, the state has expended five judge-years on working out the knotty, inconsequential little problems attendant upon stamping out ingratitude and burning down the barn to prevent collusion. This is not only a human and intellectual extravagance but also a considerable economic waste.⁹² If the ratio of approximately 125 civil dispositions by the superior courts to every appellate civil disposition⁹³ holds true in the area of Guest Act litigation, it may be assumed that the superior courts have been required to dispose of some 25,000 Guest Act cases to date. The manpower and economic expenditure inherent in that figure is staggering. (Of course, presumably a substantial number of those cases would have required judicial disposition, anyway, but common sense suggests that absent the special exemption inherent in the guest statute—and the legal and factual problems that exemption creates—a major number of those cases would have been settled and those tried would have consumed considerably less time and energy.)

That gross volume of business, it is submitted, constitutes no minor expenditure of public effort and finance, all to the supposed object of making sure that sufficient gratitude is felt for a free ride and/or of providing yet another advance guarantee against the per-

⁸⁹ Vagaries of indexing, citation and the like in this incessantly-involved statute render it impossible to assert didactically the accuracy of any figure. If there is a discrepancy in number, it is small, however.

⁹⁰ To some extent a subjective distinction must be made here. In many cases, the interpretation or application of the statute obviously controlled the appeal and therefore the cases are included, while in a large number of excluded cases the statute was mentioned only by analogy, background information or the like and was not involved in any way in the issue on appeal. In a number of cases, however, it is necessary for the reader to interpret the opinion to determine whether the statute was controlling on the settlement of the issue on appeal (or one of the issues on appeal). In making this determination, a sort of "but for" test was applied: Would the appeal have been necessary or the outcome or issues have been different if California had never adopted a guest statute?

⁹¹ 1968 ANN. REP. OF THE ADMIN. OFFICE OF THE CAL. CT. Table 5.

⁹² Even in pure dollars, this is no mere bagatelle. The current going rate (based on the appropriations for new appellate judges) is \$77,000 per judge or, as a package deal, five for \$400,000 (curiously enough, they are not cheaper by the almost-half-dozen). CAL. GOVT. CODE § 69103 (Ch. 894 § 3 Deering 6 Advance Leg. Serv. 1968).

⁹³ 1968 ANN. REP. OF THE ADMIN. OFFICE OF THE CAL. CT., Tables 5, 12-16.

petration of criminal fraud. It is, of course, minimal compared to the harm done to the mass of individual litigants injured by negligent hosts, who must either see their injuries go uncompensated or else achieve compensation only after running a gauntlet of time, legal expense and the like. But it is still no small burden to toss onto the back of an already-groaning judicial system.

The mere fact that a statute produces a great deal of litigation is not, of itself, a basis for condemning it.⁹⁴ But when a statute of such narrow, parochial and bizarre nature as this becomes one of the central concerns of the legal machinery, it is a matter worth thinking about.

It is submitted that courts, in California and elsewhere, have better channels for employing their finite time and energy than in counting the number of angels dancing on the pinhead of the guest statute. Rather than wrestling with how "wilful misconduct" is to be defined for twelve lay jurors (who will probably make their own arbitrary decision anyway) the appellate courts might better explore the brewing problems of fair trial versus free press. Instead of practicing alchemistic analyses as to when dross turns to the gold of "compensation" or "motivating influence," the courts might better devote more time and deliberation to the competing interests of order, stability and public safety vis-à-vis jealous and effective protection of the rights of the accused when confronted by the monolithic state. Rather than choreographing an intricate dance as to when a guest ceases to be a guest, or when a ride ceases to be a ride or when a ride is on a public highway, the courts might better define—and enforce—the rights of injured consumers who claim to have sustained product-inflicted injuries and, for that matter, the concomitant right of manufacturers and purveyors of the goods which are essential to an affluent society to be free from oppression or plundering by spurious or unfounded claims.⁹⁵

⁹⁴ After all, the first amendment to the United States Constitution, with its fundamental guarantees of freedom of religion, freedom of speech, freedom of the press, freedom of assembly and the right to petition for redress of grievance, is frequently cited also. As a matter of fact, it is cited almost precisely the same number of times by California courts as is the Guest Act over the years—a fact which is itself somewhat disturbing when the two provisions are compared.

⁹⁵ It is not only the judges who have been caused extra, unproductive labor in this field; the bar has shared. To an extent unparalleled in any other form of appellate litigation, concerned lawyers have participated as amici curiae in Guest Act litigation—apparently out of a felt need to assist in improving the state of the law, or perhaps even more likely, to guard against making it even worse. This has reached a crescendo in recent years when the mere fact that an appeal involves a citation to the Guest Act seems to render it *de rigeur* for both the plaintiff-oriented and defense-oriented professional societies to marshal their paladins.

B. The Statute Has Seriously Disrupted the Normal and Necessary Relationships Among the Different Levels of Courts

Another aspect of the appellate history of the statute is a good deal more subtle than mere proliferation and gross numbers of appeals, and at the same time more disquieting. This involves the apparent reluctance of the lower courts to accede to the leadership of the higher tribunals.

Despite the central premise of a multi-level judiciary that the lower courts must follow the lead of the higher, it seems that where the Guest Act is concerned, the court of appeal is somewhat lacking in influence over trial court decisions, while at the same time the supreme court often seems to gain grudging acceptance—at best—from the intermediate appellate court. Repeatedly, the supreme court has told the courts of appeal that the Guest Act, as a special exemption, must be narrowly construed⁹⁸ and that liability for fault, rather than nonliability, must be the rule in questionable cases. In a distressingly high percentage of cases, the response seems to be: Not unless a hearing is granted in the supreme court.

Of all the cases in which a hearing has been granted following the first appellate decision, the supreme court has disagreed with the court of appeal a staggering twice as often as it has agreed. That, however, does not tell the entire story; in the smaller number of cases in which there has been agreement between the two levels of appellate judiciary, it has existed in cases where the initial decision was for the injured plaintiff three times as often as where the first appellate decision favored the defendant. Similarly, where there has been disagreement, the supreme court has ruled for the plaintiff as against a court of appeal ruling for the defendant substantially more often than the reverse situation has occurred.

As to disagreement between the court of appeal and the superior courts (without intervention by the supreme court) the picture is similar. As expected, the trial court is affirmed on appeal almost three times as often as it is reversed. However, where the plaintiff prevailed at trial that ratio is increased to three and one-half to one in favor of affirmances. Where the defendant prevailed at trial, however, the ratio of affirmances to reversals is reduced to exactly two to one.

But perhaps the most conspicuous feature of all is the willingness of superior courts to take the case from the jury and render a

⁹⁸ *Williams v. Carr*, 68 A.C. 603, 611, 440 P.2d 505, 511 (1968); *O'Donnell v. Mullaney*, 66 Cal. 2d 994, 997, 429 P.2d 160, 162 (1967); *Prager v. Isreal*, 15 Cal. 2d 89, 98 P.2d 729 (1940).

judgment for the defendant on one of the extraordinary or drastic bases (sustaining a demurrer or granting a nonsuit, directed verdict or judgment notwithstanding the verdict). Of the appeals from judgments for the defendant which reach the intermediate appellate level, more than half were some such extraordinary orders; predictably, only a small fraction withstood appellate review. By contrast, however, the number of such non-meritorious dispositions which survived transfer to the supreme court virtually reaches the level of the statistically minuscule.

Therefore, the picture is that trial judges display an excessive willingness to invade the jury's province and summarily end the plaintiff's case, despite abundant evidence of the likelihood that such action will be held improper; coupled with that, there is the picture of the intermediate appellate court which is sharply critical in its review of such drastic orders, but still apparently more in sympathy with them than with the court of last resort.

In short, the flow of persuasion seems to be precisely reversed from the course which it should take. Judicial pioneering by the lower courts in unsettled areas is, of course, a boon to be sought and cherished, but lower court unwillingness to follow the lead of the higher courts is nothing but judicial anarchy. It is the antithesis of our philosophy of judicial administration to create a system in which a litigant cannot enjoy the benefit of the supreme court's interpretation of a legal principle without actually reaching the supreme court. That creates an intolerable burden upon the individual litigant, but it also creates a practically intolerable strain on the supreme court if the only way its views can be enforced is by its substituting itself for the superior courts and the courts of appeal.

Such a situation is both chaotic and wasteful. A form of legislation which produces chaos and waste ought to be viewed with a jaundiced eye.

C. The Statute Has Produced a Crazyquilt of Indefensible Adjudication

Finally, there is the nature of that which the courts have wrought. (One should not deal too harshly with them; a hard pressed appellate court is naturally going to give first priority to the serious business of the judiciary, relegating such matters fugitive from the debating societies as guest statute problems to spare time and less-than-careful consideration.) It is a sorry picture which, of course, is intrinsically disturbing to anyone who believes that the web of the law, if not seamless, should at least approach the seemly.

Apart from its intrinsic debits, however, it is submitted that any area of the law which is characterized by apparently cynical caprice and gamesmanship must indeed "do sly injury to the law"⁹⁷ itself. The law has enemies and enmity enough among the growingly vocal "know-nothing" fringe without supplying Exhibits A to Z to serve as examples. Just as the law deserves respect, it must earn that respect by acting rationally and respectably. It does not in this field. It plays games.

1. *The What-Is-A-Ride Gambit.* One of the principal Games Courts Play is that of taking one word from the statute and gazing piercingly at it through a microscope darkly.⁹⁸ For example, there is the Ride Game in which the problem is to ascertain whether somebody alighting from an automobile, or with one foot on the running board, or running to it, or from it, standing in front of the car cranking it, or what-not is "riding" or in the "throes of a ride."⁹⁹

2. *Ploy: When Is a Highway a Highway?* Another stimulating game involves the problem of when is a vehicle not on the highway on the highway. California felt obliged to go through three or four decades of analogies, agonizing over whether a statute—which applies only to cars on the highways—applies to cars not on the highways,¹⁰⁰ but finally decided that, when the legislature said highway it meant highway.¹⁰¹

3. *The Best Brouhaha: Find The Consideration.* The real fun-and-games, however, arises when the issue is what constitutes "compensation" or a tangible benefit (which, roughly translated, means passenger status) or conversely what constitutes mere "customary courtesies of the road," "pleasure of the rider's company" or "social purpose" (i.e., guest). It would be nice to console the reader with some thread of rationality but, alas, that is beyond the meager

⁹⁷ Traynor, *No Magic Words Could Do It Justice*, 49 CALIF. L. REV. 615, 621 (1961).

⁹⁸ The irreverent would say through a kaleidoscope.

⁹⁹ *Boyd v. Cress*, 46 Cal. 2d 164, 293 P.2d 37 (1956); *Prager v. Isreal*, 15 Cal. 2d 89, 98 P.2d 729 (1940); *Elisalda v. Welch's Sand & Gravel Co.*, 260 A.C.A. 46, 67 Cal. Rptr. 57 (1968); *Smith v. Pope*, 53 Cal. App. 2d 43, 127 P.2d 292 (1942); *Harrison v. Gamatero*, 52 Cal. App. 2d 178, 125 P.2d 904 (1942); *Noreas v. Perry*, 135 Cal. App. 202, 26 P.2d 886 (1933).

¹⁰⁰ *Prager v. Isreal*, 15 Cal. 2d 89, 98 P.2d 729 (1940).

¹⁰¹ *O'Donnell v. Mullaney*, 66 Cal. 2d 994, 429 P.2d 160 (1967). Not without a battle, however. The intermediate court held that since the legislature had amended the original statute—which contained no such limitation—to restrict the operation of the guest statute to vehicles "upon a highway" that certainly must have meant that the legislature wanted the statute to apply on parking lots, amusement center areas, private roadways and other non-highway locations. *O'Donnell v. Mullaney*, 55 Cal. Rptr. 827 (1967) *vacated*. Spirited battle, pro and con, was done over the proposition by whole phalanxes of lawyers before a highway was discovered to be a highway.

resources of the writer—just as it seems to lie beyond the considerable resources of the courts.

For example, a rider who invited the driver to dinner, agreeing to pay all of the driver's expenses of the evening (and in fact paying them) in order to pick the driver's brain concerning divorce problems, was held to be indulging in mere courtesies of the road.¹⁰² But when two employees decided to go to dinner after work ("dutch treat"), it was a business function because they planned to discuss a fashion show which was to occur at their place of business in the future.¹⁰³

Then, too, a trip from Los Angeles to Ensenada and back for the purpose of enabling driver and rider to enter into the bonds of holy matrimony was held to be a mere courtesy of the road and insufficient even to allow an inference of tangible benefit.¹⁰⁴ However, it was held that assistance with Christmas shopping constituted compensation as a matter of law and beyond argument.¹⁰⁵

Similarly there is the problem of staff members in summer camps. When they rode around in trucks at Camp Lilienthal, they were receiving a mere gratuity, the "small courtesies that went with rank".¹⁰⁶ While making the circuit on behalf of the San Mateo Presbytery, however, counselors were enjoying no mere badge of rank, but rather an inducement to the over-all functioning of the secular (and presumably religious) operations of the venture.¹⁰⁷

Where plaintiff and defendant were both involved in putting together a congregation picnic (one of them being unable to speak English and unfamiliar with the locale) and it was agreed that they would assist one another in selecting, loading and otherwise obtaining the necessities for the picnic, this was mere courtesy, since no money changed hands.¹⁰⁸ On the other hand, the mere possibility that the rider might give some assistance in moving a student's belongings from one "pad" to another was ample to render it a business trip.¹⁰⁹

Let us assume a pre-arrangement under which one party binds himself to perform a specified portion of the driving and further-

¹⁰² *Stephan v. Proctor*, 235 Cal. App. 2d 228, 45 Cal. Rptr. 124 (1965).

¹⁰³ *Tucker v. Landucci*, 57 Cal. 2d 762, 371 P.2d 754 (1962).

¹⁰⁴ *Boykin v. Boykin*, 260 A.C.A. 817, 67 Cal. Rptr. 520 (1968).

¹⁰⁵ *Kruzie v. Sanders*, 23 Cal. 2d 237, 143 P.2d 704 (1943).

¹⁰⁶ *Humphreys v. San Francisco Area Council*, 22 Cal. 2d 436, 139 P.2d 941 (1943).

¹⁰⁷ *Malloy v. Fong*, 37 Cal. 2d 356, 232 P.2d 241 (1951).

¹⁰⁸ *Brandis v. Goldanski*, 117 Cal. App. 2d 42, 255 P.2d 36 (1953).

¹⁰⁹ *Neuser v. Britto*, 237 Cal. App. 2d 444, 46 Cal. Rptr. 898 (1965)—somewhat perplexingly citing *Brandis v. Goldanski*, 117 Cal. App. 2d 42, 255 P.2d 36 (1953).

more to contribute a calculable proportion of the aggregate expenses of travel, in the absence of which agreement the whole trip would never have been made. Is that a contract and a consideration? Answer: No; this "was in no sense" a mutually advantageous enterprise, and "no inference can be drawn" that consideration existed.¹¹⁰

Okay, then, how about an agreement by two families who had been friends for many years, and planned to take a trip to the Rockies, as to which they had each agreed to contribute equally to a common fund for gasoline, oil, meals, lodging, and sightseeing. Obviously, remembering the teaching of the case just discussed, there would be even less basis for drawing an inference of compensation. Right? Wrong; that not only permitted an inference of mutual benefit, it compelled that inference as a matter of law!¹¹¹

Or, there was the plaintiff, "a man very well informed as to general market conditions, giving considerable attention thereto, and at times making trips to the City of Oakland, where he gained further information as to market conditions,"¹¹² and the defendant who wanted to sell 200 boxes of oranges on that market. Defendant, a sound businessman, invited plaintiff "to accompany him to Oakland and aid him in securing the best available market in which to sell the oranges."¹¹³ Plaintiff agreed, and as the court observed "everything went well until the parties reached a place on the highway known as Dublin canyon"¹¹⁴ where the defendant negligently ran off the road, incinerating his Dodge sedan and bringing the rider's orange-marketing expertise to no good end. Held—sort of—that this might or might not be compensation and a business purpose. But, where two employees of the same employer both were required to attend the same sales meeting, that, ipso facto, constituted compensation given by one for a ride to the meeting in the vehicle of the other.¹¹⁵

¹¹⁰ Ray v. Hanisch, 147 Cal. App. 2d 742, 306 P.2d 30 (1957).

¹¹¹ Whitmore v. French, 37 Cal. 2d 744, 235 P.2d 3 (1951). By the by, the *Whitmore* case, which was decided six years before *Ray v. Hanisch*, 147 Cal. App. 2d 742, 306 P.2d 30 (1957) was cited by the *Ray* court in support of its holding, not once but twice. See § VI. B, *supra*, for discussion of whether the supreme court has any influence with the courts of appeal in this field. See the writings of Mr. Lewis Carroll for a rationale.

¹¹² Haney v. Takakura, 2 Cal. App. 2d 1, 2, 37 P.2d 170, 171 (1934). That case was cited 34 years later in support of the proposition that traveling to get married is courtesy of the road, as a matter of law. Boykin v. Boykin, 260 A.C.A. 817, 67 Cal. Rptr. 520 (1968).

¹¹³ Haney v. Takakura, 2 Cal. App. 2d 1, 3, 37 P.2d 170, 171 (1934).

¹¹⁴ *Id.*

¹¹⁵ Thompson v. Lacey, 42 Cal. 2d 443, 267 P.2d 1 (1954). Any lawyer who has had more than a nodding acquaintance with the field can undoubtedly supply his own annotations to this quick skimming.

CONCLUSION

Admittedly, recent decisions in the field of host-guest litigation have constituted an attempt to step in the right direction, and a slight improvement in a field of law which is ripe therefor. It seems unarguable, however, that it has been an attempt and a step analogous to the great strides forward which improved smog devices have worked in curing air pollution!¹¹⁶

Three and a half decades of confusion, illogic, solecism, gamesmanship—and unconstitutionality—are enough. Every segment of the legal community knows the true nature and state of the guest statute; it is time for some court to play the role of the proverbial small boy and point out the truth to the sovereign—that the legislation is unclothed by constitutionality.

One tends to suspect that somewhere in this great state the right court is just waiting to be asked in the right way in the right case.

¹¹⁶ At this juncture, it is perhaps appropriate to point out that the writer is not currently or potentially involved in any Guest Act litigation. This is a mildly interesting phenomenon in itself (since the nature of the animal makes it rare that an active practitioner is spared any such involvement), but it is also mentioned as circumstantial evidence that the observations collected here are not the product of current advocacy—although admittedly past familiarity has helped to breed present contempt.